Supreme Court, U.S.
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No. 02 114

In The Supreme Court of the United States

MARK GRAVITTE,

Petitioner,

v.

NORTH CAROLINA DIVISION OF MOTOR VEHICLES; NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; DAVID McCOY; JANICE FAULKNER; DAVID RICHARDS; STATE OF NORTH CAROLINA, and all agents and successors in office of the official capacity defendants,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. Whether Respondents' police ticket quotas are unconstitutional under the Fourth or Fourteenth Amendments to the Constitution, where law enforcement officers in some districts/geographic areas are required to issue a predetermined number of tickets on a daily basis without regard to reasonable suspicion or probable cause of any offense, and the failure to comply with either quota results in the imposition of disciplinary action against the officers?

2. Whether Petitioner Gravitte stated an equal protection claim where Petitioner, a sworn law enforcement officer, was subjected to Respondents' ticket quota scheme including issuance of a minimum of five charges per day and required to maintain an average of not less than 20% of the station or district average of tickets, whereby other similarly situated law enforcement officers in other districts are not required to comply with any ticket quotas?

3. Whether Village of Willowbrook v. Olech, 528 U.S. 562 (2000), and its antecedents, apply to public personnel decisionmaking and prohibit non-suspect class discrimination against law enforcement officers in personnel actions?

4. Whether Respondents' mandatory ticket quotas, without regard to reasonable suspicion to stop or probable cause to charge, constitutes an *unconstitutional condition of employment* for law enforcement officers in violation of the First or Fourteenth Amendments where Respondents' management officials have conceded and testified that they were taught that such ticket quotas are illegal and improper?

5. Whether a law enforcement officer's work location is a permissible basis upon which to classify officers for purposes of imposing ticket quotas on officers in some geographic areas, but not in other areas, where state law standards make no distinctions in work based upon geographic location?

6. Whether a law enforcement employer may constitutionally eliminate all traditional police discretion by requiring its officers to arbitrarily stop traveling motor vehicles, without any reasonable suspicion of any offense, and to require that officers issue charges to a predetermined number of persons each day?

7. Whether the Fourteenth Amendment permits law enforcement agencies to require that some but not all officers "initiate law enforcement action arbitrarily and without cause" and impose discipline for non-compliance?

8. In a public employment dispute where a law enforcement officer demonstrates arbitrary and capricious retaliatory governmental action, should the reviewing court apply the traditional arbitrary and capricious substantive due process test or the shocks the conscience test from other law enforcement liability cases?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT IN ACCORDANCE WITH RULE 29.6 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES.

Petitioner Mark Gravitte was the plaintiff-appellant below and shall be referred to as "Petitioner" or "Gravitte" throughout this petition.

The Respondents are Janice Faulkner, David McKoy, David Richards, the North Carolina Division of Motor Vehicles, the North Carolina Department of Transportation and the State of North Carolina, who were defendants-appellees below and shall be referred to as "Respondents," or as "DMV."

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CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals is not reported and is annexed hereto. (App. 1). The decision affirmed the decision by the United States District Court for the Eastern District of North Carolina entered into on March 31, 2000. The District Court's order dismissed plaintiff's complaint under Rule 12(b)(6). Petitioner's amended complaint is annexed hereto (App. 17). The District Court's order and opinion is not reported and is annexed hereto. (App. 9).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on Petitioners' timely petition to the Court of Appeals for rehearing and rehearing en banc and was denied on April 23, 2002. That order is annexed hereto. (App. 15). This petition is timely filed within ninety days of the denial of the petition for rehearing and rehearing en banc. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution which provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities or citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Officer Mark Gravitte filed his original complaint on November 17, 2000. JA8[1] Officer Gravitte filed accompanying motions for a temporary restraining order and preliminary injunction. JA30 Respondents filed an answer. JA51 On December 14, 2000, United States District Judge Terrence Boyle denied Officer Gravitte's motion for a TRO. JA76 The trial court did not hold any type of hearing or allow any submission of evidence before ruling on Gravitte's motion for a TRO.

A preliminary injunction hearing was scheduled for January 9, 2001. On January 5, 2001, Defendants filed a motion to quash subpoenas issued to various DMV officials in connection with the preliminary injunction hearing, essentially on the grounds of witness inconvenience. JA79-81 On January 6, the District Court issued an order quashing all of Gravitte's subpoenas, even including the subpoena issued for Gravitte to attend his own hearing.

On January 9, 2001, a hearing was held, which only involved oral argument regarding Gravitte's motion. JA88 Defendants subsequently filed a motion to dismiss under Rule 12. JA138, 140 On January 19, Gravitte filed a supplemental brief with additional evidence including affidavits. JA150

Gravitte's supporting evidence included official memoranda documenting DMV's two forms of ticket quotas (JA171), official memoranda documenting adverse employment action for failure to comply with the ticket quotas (JA173), and several affidavits of witnesses to the quotas, including an attorney and a law enforcement personnel expert. JA177-200

On February 8, 2001, Gravitte filed a motion for leave to file an amended complaint, which was ultimately allowed.

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[1]References to JA are to the joint appendix filed with the U.S. Court of Appeals for the Fourth Circuit.

JA216, 510 On February 11, Gravitte served a response to Defendant's motion to dismiss. JA249 On February 13, 2001, in connection with Gravitte's preliminary injunction motion, Gravitte completed depositions of two adverse hostile DMV management officials, Clifton Edwards and William Thompson.

On May 1, 2001, the District Court filed an order dismissing the amended complaint for failure to allege any valid claim for relief. JA509 The trial court also dismissed Gravitte's motion for a preliminary injunction as moot. JA509-514 On May 17, 2001, Plaintiff filed his Notice of Appeal. JA516.

On March 25, 2002, the U.S. Court of Appeals for the Fourth Circuit issued an unpublished decision, affirming the trial court's dismissal of Petitioner Gravitte's complaint below. The Fourth Circuit allowed participation by the Southern States Police Benevolent Assocation as amicus curiae. On April 5, 2002, Petitioner timely filed a joint petition for rehearing and petition for rehearing en banc under F.R.A.P. 35 and 40. On April 23, 2002, the Fourth Circuit denied Petitioner's petition for rehearing and rehearing en banc.

STATEMENT OF FACTS

This case arises from DMV's ticket quota scheme, which has two components:

> 1) five charges per day for each officer in some districts, and,
>
> 2) in some districts, an officer's tickets must not fall 20% below the district or station average of tickets per officer, which is a quota that cannot be predetermined.

Officer Mark Gravitte is a veteran sworn law enforcement officer employed by the N.C. Division of Motor Vehicles (DMV). JA218 DMV developed a policy, practice

and scheme of imposing ticket quotas on DMV officers in some DMV Districts including the District where Gravitte was assigned. JA 217, 223 Officer Gravitte resides within DMV District 5, which is a District that imposes DMV's ticket quotas as a condition of employment. JA 217 DMV's policy, practice and custom requires law enforcement officers employed within some DMV Districts to issue a minimum of five charges per day as a required duty of their jobs. JA 217, 223 DMV employs a second type of ticket quota, which is premised upon a requirement that officers in the covered quota districts issue charges at least equal to 20% of the station average of charges. JA237 The gravamen of the amended complaint appears in the following passages:

> 3. Defendants and their agents have developed a policy, practice, custom and scheme of imposing ticket/citation quotas on DMV employees in some DMV Districts, which obstructs justice and selectively enforces law within those Districts in violation of North Carolina and Federal law. Defendants' policy, practice and custom requires North Carolina law enforcement officers employed in some Districts by the N.C. Division of Motor Vehicles [hereinafter DMV] to issue certain numbers of citations and charges as a required function of their jobs. Plaintiff Gravitte resides within DMV District 5, which is a District that imposes DMV's ticket quota as a condition of employment.
>
> 4. Defendants have and are attempting to coerce DMV officers including Plaintiff Gravitte to stop and issue citations and criminal charges against North Carolina citizens regardless of the lack of reasonable suspicion for stopping traveling motor vehicles or a proper factual basis to initiate such charges. Defendants' ticket quota scheme constitutes an attempted obstruction of justice and selective law

enforcement by forcing DMV officers, under threat of adverse personnel action and deprivation of salary, to stop travelling motor vehicles without cause and issue charges regardless of the merits of such charges.

5. Defendants' practices are seeking to coerce Plaintiff Gravitte and other DMV officers to interfere with the right of travel of citizens to freely travel without undue governmental interference and obstruction. The practices complained of herein preclude and interfere with Plaintiff Gravitte and other DMV officers within the subject Districts from lawfully performing their jobs under the Federal and North Carolina Constitutions, under N.C.G.S. 20-114 and other law.

6. Defendants have issued adverse retaliatory disciplinary action against Plaintiff Gravitte and other DMV officers for their alleged failure to comply with Defendants' ticket quota scheme. Such disciplinary action was arbitrary, capricious, retaliatory and grounded in attempted selective law enforcement.

20. In addition to the adverse impact on North Carolina citizens from DMV's coercive pressure on law enforcement officers to satisfy and comply with the ticket quota scheme, DMV's policy, practice and custom of ticket quotas has and is adversely affecting the employment and careers of North Carolina DMV officers including Plaintiff Gravitte. Whenever there is a written supervisory complaint in the form of a counseling record which is placed within the personnel file of a DMV officer, such complaints adversely affect the ability of an officer to obtain raises and to be successful in promotional efforts.

Respondents had two management officials attempt to justify the quotas by deposition testimony. However, Sgt. Edwards testified that he was taught that ticket quotas or mandatory minimum numbers of citations or charges were *improper and illegal.* JA 347. Lt. Thompson also acknowledged his belief that ticket quotas are improper. JA 473.

In a memoranda dated April 13, 2000, DMV Lt. Thompson explained that "Raleigh [DMV Headquarters] has mandated we all perform five enforcement activities per day..." JA233. Subsequent memoranda demonstrate how DMV insists on enforcement action regardless of whether the facts and circumstances justify such enforcement action. JA234

DMV's second type of quota requires that officers must also issue sufficient numbers of charges at least equal to 20% of the station average. JA237 Gravitte was disciplined for non-compliance with the quotas, and was ordered "to issue more NCUC's to CMV's than to the private sector." JA236 DMV's document entitled "Averages for DMV Enforcement" (JA238) demonstrates how DMV computes six month averages for its second type of quota; this document also demonstrates how DMV uses quantitative compliance as a part of its official performance evaluation scheme. JA 238

DMV expressly conditions officer performance evaluations on its mandatory quotas:

> "If you [DMV officer] average from the numbers above you will only receive a good on your evaluation, you will need to go above the average to receive very good." JA238

The June 8, 2000 memoranda from Sgt. Edwards to all Salisbury DMV Officers demonstrated one of the ticket quotas:

> "The requirement for an average day's work is five enforcement actions per day. Anything less than this amount is unsatisfactory." JA239

Personnel records for Officer Rose demonstrate how during the second quarter of 2000, Officer Rose issued 18 particular types of tickets (ENF-001's), which was more than 20% below the station average. Therefore, he was subjected to disciplinary action. JA244 Additional documents show the forms used by DMV to monitor and enforce its quota scheme. JA245

Several affidavits from management officials demonstrate DMV's ticket quotas, and their discriminatory enforcement and harm to Officer Gravitte, other law enforcement officers employed by DMV, the traveling public and the law enforcement profession. As explained by DMV Sgt. Todd Burgin:

> "Regardless of whether called an enforcement action or ticket quota, a DMV officer is expected and required to do whatever he or she has to do to comply with the quota. The ticket quota does not allow for excuses and is a source of constant pressure on DMV officers. This includes randomly stopping moving motor vehicles to attempt to find possible violations..." JA213.

Sgt. Burgin explained how DMV's quota for five enforcement actions per day "is not uniform and applicable in all of the districts throughout North Carolina. For instance, in District Six, a quota of five enforcement actions per day is mandatory and applicable on all officers...." JA183 Sgt. Burgin further described how the DMV district which is in Halifax, North Carolina "does not impose or require any quota of enforcement actions by DMV officers assigned there." JA183. Thus, the DMV officers in Halifax are not under the same pressures, terms and work conditions as are Gravitte and others. State law, or other

standards, makes no distinctions in duties of these law enforcement officers.

Sgt. Burgin explained how the "lack of uniformity and the imposition and application of the ticket quota is a matter of serious concern because it imposes job-related conditions on some DMV officers but not on other similar officers of the same rank." JA183. Sgt. Burgin explained that DMV's quota scheme "is very harmful to both law enforcement officers and the public..." JA183. Other DMV officers and management officials share Sgt. Burgin's observations. Sgt. Jeffrey Stallings explained:

> "the ticket quota is merely a 'numbers game' that does not take into consideration the quality of performance by the officers in initiating the enforcement actions. The ticket quotas have and are continuing to cause negative morale for DMV officers. Some DMV districts require the quotas, while other districts do not." JA185.

DMV's ticket quotas have adversely affected the ability of DMV officers to properly and successfully serve as law enforcement officers. JA187 DMV's ticket quota scheme requires that officers "initiate law enforcement action arbitrarily and without cause." JA187.

DMV's second quota requirement provides:

> "If an officer falls 20% below the district average, the officer is subject to and is given official adverse personnel action in the form of a written supervisory complaint." JA190

DMV's 20% quota rule is inherently vague and subjects an officer to punishment without having a standard or criteria which is predictable or known. Because officers do not have any way of knowing what the district or station average of enforcement actions is, they have no way of knowing how to target the number of their tickets to comply with DMV's quota scheme. Therefore, Gravitte and others

are subject to punishment for an unknown and undefined standard.

DMV Sgt. Todd Burgin explained:

> *The lack of uniformity in the imposition and application of the ticket quota is a matter of serious concern because it imposes job-related conditions on some DMV officers but not on other similar officers of the same rank. Requiring some DMV officers to comply with the quota based upon the District in which they are assigned has raised concerns of discrimination among employees.* (Emphasis added) JA182-183

Sgt. Jeffrey Stallings similarly stated:

> As a management official, I am concerned that the ticket quota practice has and is currently causing significant problems for DMV officers. The ticket quota is merely a "numbers game" that does not take into consideration the quality of performance by the officers in initiating the enforcement actions. The ticket quotas have and are continuing to cause negative morale for DMV officers. Some DMV Districts require the quotas, while other Districts do not.

DMV Lt. W.E. Thompson proclaimed in official memoranda at JA171:

> "Since Raleigh [DMV headquarters] has mandated we all perform five enforcement activities per day, it is important that the daily [report] be filled in COMPLETELY." (Emphasis in original).

James B. Merritt, a fifty year veteran of the law enforcement profession who has served in virtually every conceivable law enforcement capacity, demonstrated the dangerous ramifications of DMV's quotas to everyone

including law enforcement officers, their supervisors, their agencies, the motoring public, citizens and even the courts. JA199. Mr. Merritt demonstrated how "DMV's ticket quota practice will likely have a substantial disruptive effect on the actual law enforcement operations of the Division of Motor Vehicles." JA199 Mr. Merritt explained that he has never examined a practice with greater potential adverse repercussions for the entire criminal justice system than DMV's ticket quota practices. JA199

The affidavit of Attorney Greg Kornegay demonstrates that DMV's ticket quota practice will likely result in additional litigation in the trial of traffic related cases. As a former experienced prosecutor, Mr. Kornegay also demonstrated the ethical problems associated with the criminal prosecution of Defendants who have been charged pursuant to quotas. JA192-93

THE FOURTH CIRCUIT DECISION CONTAINS EXPRESS FACT FINDING, INAPPROPRIATE UNDER RULE 12(B)(6) REVIEW.

The Fourth Circuit erroneously found facts by concluding:

> "the policy adopted by the DMV helps to insure a minimum quantity of work from its law enforcement officers and helps to prevent shirking on the job. An employment policy enacted in pursuit of these goals, goals that would be shared by any reasonable employer, can hardly be deemed "egregious" or "outrageous," even if it impinges on traditional police discretion and imposes more burdensome working conditions on law enforcement officers." Slip opinion at 5.

The foregoing is erroneous for several reasons. First, nothing in the complaint or record suggests that the quota policy "helps to insure a minimum quantity of work from its law enforcement officers..." Further, there is no evidence

that any law enforcement agency in the country has "an employment policy enacted in pursuit of these goals..." The panel decision has found a "goal" in violation of the 12(b)(6) standard of review. Petitioner did not plead the quotas as a "goal" and this analysis has mischaracterized what Gravitte has pled.

The Fourth Circuit opinion further found:

> The plaintiffs' allegation that officers are "pressured and coerced to violate the law as a result of the ongoing ticket quota scheme,"[omitting footnote] J.A. 234, does not alter our conclusion. While it is conceivable that officers might be tempted to fill their quota by issuing citations for borderline or non-existent violations out of laziness, here is no allegation that the numerical quotas are so onerous that it is impossible for a diligent DMV officer to meet them without breaking the law. To be sure, the alleged ticket quota policy makes a law enforcement officer's job more difficult. We are also sure that is not enough, standing alone, to constitute a substantive due process violation.

Respondents' ticket quotas are not minimum work standards. A work standard is an objective criteria by which work performance can be reasonably and accurately measured. DMV's quota scheme measures raw numbers of charges - and nothing more. Thus, "work" is not measured, rather merely the quantity of charging decisions. Charging decisions measure nothing that has any rational nexus to professional law enforcement work standards.

REASONS FOR GRANTING THE WRIT

I. LOWER COURT SPLITS AND EXCEPTIONAL CONSTITUTIONAL QUESTIONS WARRANT CERTIORARI

This Petition for Certiorari is premised upon several grounds, including lower court splits on issues of constitutional law and questions of exceptional importance, each of which merit review:

1) several lower courts are split regarding the extent of application of equal protection in non-suspect class public personnel contexts including but not limited to the role of motive.

2) several lower courts are split regarding the methodological tests to be applied in determining when governmental employers violate the Equal Protection Clause, especially in public personnel cases.

3) the constitutional issues before the Court are of exceptional importance to this nation's law enforcement profession because, *inter alia*, Respondents' ticket quotas have created additional physical and legal dangers for officers.

4) the issues before the Court are of exceptional importance to the traveling public because Respondents' ticket quotas mandate unconstitutional stops of innocent citizens with resulting obstruction of justice.

Respondents' law enforcement ticket quotas directly affect the ability of the law enforcement profession to deliver critically necessary police services at a time when our law enforcement professionals have never been under greater strain. The tragic events from September 11, 2001 have adversely affected law enforcement operations throughout the country. Law enforcement agencies are strained with the loss of personnel due to homeland defense

and other efforts. DMV's ticket quota scheme has corrupted routine law enforcement work.

There appears to be no published decision in the country which has addressed the narrow question of the constitutionality of law enforcement ticket quotas. The Fourth Circuit's decision below established a bold unprecedented standard which allows law enforcement agencies to micromanage front line officers even to the extent of requiring them to break the law, with resulting punishment if they do not comply. Since the Fourth Circuit decision, there has been efforts by another North Carolina law enforcement agency to adopt other less direct forms of quotas. Unless judicially restrained, these quota practices will spread.

The equal protection issues presented raise more common questions which often confront public employers and courts. The decisions below run afoul of this Court's teachings in Village of Willowbrook v. Olech, 528 U.S. 562, 120 S.Ct. 1073, 1074 (2000), where this Court extended the reach of non-suspect class equal protection. The Fourth Circuit erroneously failed to address Willowbrook, much less correctly apply the new standard enunciated by this Court.

The decisions below jeopardize the physical and legal safety of this nation's law enforcement profession.[2] Respondent's quota practices will cause officers to suffer more severe personal injuries from roadside vehicle stops, which are among the most dangerous types of routine law enforcement operations. The unconstitutional stops will cause innocent citizens to file more complaints and lawsuits against officers, thereby causing legal jeopardy and aggravation to the most dangerous profession.

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[2]The law enforcement profession is the most abused classes of public servants. See The Rising Tide of Equal Protection: Willowbrook and the New Non-Arbitrariness Standard, 11 George Mason Civ. Rts L. J. 263, 266 (2001), citing Knight v. Vernon, 214 F.3d 544 (4th Cir. 2000); Edwards v. City of Goldsboro, 178 F.3d 231 (4th Cir. 1999).

Respondents' ticket quotas overtly discriminate in application to officers depending solely upon the Districts in which they reside despite the fact that state law provides that the duties and functions of DMV Vehicle Enforcement Officers have the same job function statewide. Respondents' ticket quotas are unconstitutional because they are arbitrary on their face, and because they require arbitrary vehicle stops without reasonable suspicion thus violating the Fourth and Fourteenth Amendments. Even if Respondents' ticket quota scheme is not inherently unlawful as an unconstitutional stop, it has been discriminatorily imposed in an arbitrary manner thereby requiring Gravitte to comply with the quotas while not requiring other DMV officers in other districts to comply with the quotas.

The trial court concluded that "the state has a legitimate interest in setting minimum work standards for its law enforcement officers." Order, JA512. In order to be lawful, minimum law enforcement work standards must be both lawful and applied in a non-arbitrary and non-discriminatory manner. DMV's ticket quotas are not work standards at all because DMV only selectively imposes the quotas in some districts, the 20% quota rule is unpredictable, and because the quotas do not measure quality of work or performance. Respondents' quotas measure only raw numbers of charges, rather that the validity of the charges or the charging officer's performance or conduct.

There is no case or other authority that has sanctioned such a novel approach to law enforcement work standards as the courts below have provided. The unprecedented holding of the courts below will lead law enforcement employers into a mere numbers game where officers are pressured to profile certain groups and/or manufacture charges.

This nation's law enforcement professionals are not like traveling sales personnel with a specific sales quota from an assigned territory that can be mechanically applied.

Charging decisions require professional analysis, *police discretion*, an examination of the totality of the evidence, and application of law enforcement training and constitutional law. Police discretion has been one of the hallmarks of the law enforcement profession which the courts below failed to recognize. DMV's ticket quotas trample that essential police discretion and subverts the rule of law.

II. THE FOURTH CIRCUIT PANEL OPINION FAILS TO CORRECTLY APPLY EQUAL PROTECTION DOCTRINE FROM THIS COURT.

In Village of Willowbrook v. Olech, 528 U.S. 562, 120 S.Ct. 1073, 1074 (2000), the Court reaffirmed the reach of modern equal protection doctrine in a classic non-suspect class case:

> "Our cases have recognized successful equal protection claims brought by a 'class of one' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.
>
> The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person...against intentional and arbitrary discrimination...."

Gravitte pled Willowbrook's elements of disparate treatment plus irrationality, at JA218, 233, 227, 229 and 230. Willowbrook arose out of a land use dispute whereby the City demanded a thirty three foot easement where the ordinary practice required only a fifteen foot easement. Officer Gravitte, like Ms. Olech, received a different type of treatment: Gravitte must issue five charges per day - no matter what, while other similar officers in other districts are not required to comply with that condition quota.

In Willowbrook, plaintiffs alleged a violation of equal protection premised upon "irrational and wholly arbitrary" action by the City. The Court held that Plaintiff's allegations that the Village's conduct was "irrational and wholly arbitrary" was sufficient to state a "traditional" equal protection claim, "quite apart from the Village's subjective motivation." 120 S.Ct. at 1075. The majority decision did not require improper motive or subjective ill will. Id. Willowbrook clarified application of the Equal Protection Clause. However, the Fourth Circuit below failed to heed this Court's mandate. Other lower courts are in confusion over the meaning of equal protection in this context.

In Snowden v. Hughes, 321 U.S. 1, 8-9 (1944), the Court held that an equal protection claim may be premised upon deliberate selective enforcement based upon *"unjustifiable standards."* (emphasis added) Gravitte pled that DMV acted upon "unjustifiable standards." JA 230. In Oyler v. Boyles, 368 U.S. 448 (1962), the Court held that equal protection prohibits discrimination on grounds of race, religion or *"other arbitrary classification."* (emphasis added) Gravitte specifically pled that DMV used "arbitrary classifications." JA 230. Accord African v. Abromaitis, 2002 WL 1032405 *5 (May 23, 2002)

The Fourth Circuit below failed to correctly apply these important equal protection standards. This Court should grant certiorari in order to clarify the law and instruct the lower courts on how to apply non-suspect class equal protection in public personnel cases.

III. SEVERAL CIRCUIT AND OTHER COURTS ARE SPLIT REGARDING FUNDAMENTAL EQUAL PROTECTION ISSUES ESPECIALLY IN PUBLIC EMPLOYMENT DISPUTES.

A number of circuit cases have struggled with issues which have arose following Willowbrook. As one recent article explains:

> Willowbrook has resolved much of the uncertainty, however, some troublesome questions remain. Some Circuit courts seem already in a dizzying struggle over the motivation issue before Willowbrook's ink is dry.

The Rising Tide of Equal Protection: Willowbrook and the New Non-Arbitrariness Standard, 11 George Mason Civ. Rts L. J. 263, 266 (2001)(reviewing Willowbrook and non-suspect class equal protection claims in various contexts including public employment).

The Fourth Circuit's approach in this case is inconsistent with at least three other circuits, as well as this Court's teachings in Willowbrook and antecedents from Snowden and Oyler. The law enforcement profession needs these circuit conflicts resolved so that a uniform national body of equal protection law will apply.

A number of compelling cases have recognized the breadth of Willowbrook's reach in public personnel cases that the Fourth Circuit below rejected. For example, in Singleton v. Chicago School Reform Board, 2000 WL 777925 (N.D. Ill. June 13, 2000), the court recognized the application of Willowbrook in the context of a public employment dispute. Similarly, in Byers v. Illinois State Police, 2000 WL 1741723 (N.D. Ill. Nov. 22, 2000), the court held that a retaliation based equal protection claim in a public personnel case was sufficient to state a claim. 2000 WL 1741723 at *4. The Fourth Circuit decision below is to the contrary, rejecting the application of Willowbrook in public personnel cases. Also, in Edwards v. City of Goldsboro, 178 F.3d 231 (4th Cir. 1999), the Fourth Circuit declined to join the growing line of cases recognizing non-suspect class equal protection in public personnel cases.

Other circuit cases have long recognized the application of disparate treatment in non-suspect class equal protection cases in public employment disputes. E.g., Ciechon v. City of Chicago, 686 F.2d 511 (7th Cir. 1981); Ziegler v. Jackson, 638 F.2d 776 (5th Cir. 1981). See The Rising Tide of Equal Protection: Willowbrook and the New Non-Arbitrariness

Standard, 11 George Mason Civ. Rts L. J. 263, 266 (2001)(discussing Ciechon, Zeigler and other cases). The Fourth Circuit's approach below is far out of step with these settled cases.

In Bryan v. City of Madison, 211 F.3d 267 (5th Cir. 2000), the Fifth Circuit affirmed summary judgment for the City in a land use case. Bryan explained that in order "to successfully bring a selective enforcement prosecution or enforcement claim, a plaintiff must prove that the government's official acts were motivated by improper considerations, such as race, religion, or the desire to prevent the exercise of a constitutional right." The Fifth Circuit stated that "retaliation for an attempt to exercise one's religion or right to free speech would be expected to qualify." In a confusing footnote, the court in Bryan observed that Willowbrook "does not alter our requirement of an improper motive, such as racial animus, for selective enforcement claims." 213 F.3d at 277 n. 17. This point is at odds with the central thesis of Willowbrook.

Some lower courts have directly challenged the essence of Willowbrook. E.g., Campagna v. Commonwealth 2002 WL 1277221 *6-7 (June 7, 2002)("the applicability of the "class of one" theory to an employment-based equal protection claim seems dubious"; referring to this as a "cumbersome doctrinal issue"). The lower courts need help clarifying this doctrine, especially the narrow question of its application to public employment disputes.

In Bryan, the Fifth Circuit observed that Esmail included "personal vindictiveness" as a type of improper basis for a selective enforcement claim. However, Bryan observed that the Fifth Circuit has never addressed a vindictiveness based equal protection claim and would not in Bryan because the Plaintiff did not allege personal vindictiveness. 213 F.3d at 277 n. 18. The failure of Bryan's complaint to allege some improper motive doomed his claim under the Fifth Circuit's limited view of non-suspect class equal protection. The

Fifth Circuit's analysis and conclusion is inconsistent with the thrust of Willowbrook.

In Hilton v. City of Wheeling, 209 F.3d 1005 (7th Cir. 2000). the Seventh Circuit, speaking through Judge Posner, affirmed summary judgment for the City in a case which arose out of Plaintiff's actions in petitioning his local government for redress over police services. Plaintiff claimed that he did not receive "evenhanded" treatment by the police in mediating a dispute with his neighbors.

Plaintiff's equal protection claim was premised upon "unequal police protection." The court observed that "selective withdrawal of police protection" is "the prototypical denial of equal protection." However, the court stated equal protection does not entitle a person to adequate or any police protection. However, "if the police decided to withdraw all protection from Hilton out of sheer malice, or because they had been bribed by his neighbors, he would state a claim under Olech." The Seventh Circuit then bottomed its rejection of Plaintiff's equal protection claim on "the absence of evidence of an improper motive." The court observed that "[t]he role of motive is left unclear by the Supreme Court's decision."

Hilton directly conflicts with Willowbrook because Hilton stressed the necessity of some improper motive but Willowbrook disavows such improper motive. Professor Chemerinsky explained that "the allegation of improper motivation, which was crucial for [Justice] Breyer, was expressly disavowed by the majority as relevant to its decision." Chemerinsky, Suing the Government For Arbitrary Actions, Trial Magazine, Vol. 36 at 89 (May, 2000).

In Shipp v. McMahon, 234 F.3d 907 (5th Cir. 2000), the Fifth Circuit addressed a case involving alleged failure to provide equal police protection. The case arose from a denial of qualified immunity. The gist of the complaint alleged a failure to take appropriate police action for victims of domestic assault. However, the court concluded that because of the lack of clearly established law within the

circuit, that qualified immunity would preclude an equal protection claim premised upon the domestic violence theory in Shipp. There, the Fifth Circuit also addressed the potential applicability of Willowbrook. The court concluded that "Shipp may be able to establish an unequal police protection claim with the framework elucidated in Village of Willowbrook v. Olech." Accordingly, the Fifth Circuit remanded to allow the Plaintiff to amend her complaint to present the Willowbrook theory.

Other circuit courts have also misapplied this Court's equal protection doctrine, thereby necessitating clarification by this Court. For example, in Futernick v. Sumpter Township, 78 F.3d 1051 (6th Cir. 1996), the Sixth Circuit affirmed the dismissal of an equal protection claim by an owner of a mobile home park in an action against state and local government officials involved in regulating the plaintiff's mobile home parks. Futernick involved an allegation that the government regulatory agency selectively enforced the local environmental regulations. After a disagreement with the plaintiff, the government stopped work on a proposed sewer line extension to one of the plaintiff's mobile home parks. The trial court dismissed Futernick's equal protection claim and the Sixth Circuit affirmed.

Futernick recognized application of the selective enforcement doctrine where a victim can establish that he or she was intentionally singled out because of membership in a protected group or for the exercise of a constitutionally protected right. "Selective enforcement can also lead to Section 1983 liability if the plaintiff pleads 'purposeful discrimination' intended to accomplish 'some forbidden aim." The court observed that the issue of first impression before the court was "what aims are forbidden ones for purposes of a selective enforcement action under Section 1983."

Futernick addressed the more fundamental issue of whether selective enforcement based upon malicious or bad faith selective enforcement stated an equal protection claim. The essential question was whether malice or personal animosity is a constitutionally permissible consideration. The court observed that the First and Second Circuits recognize a valid selective enforcement claim premised upon the malice and bad faith theory.

The upshot of this massive confusion in the circuits is that law enforcement officers and employers are substantially uncertain about whether and to the extent that officers can be subjected to disparate treatment and selective enforcement of personnel and other regulations consistent with equal protection. This Court's guidance is needed to promote reasonable certainty and uniformity in the law.

IV. OFFICER GRAVITTE STATED EQUAL PROTECTION CLAIMS PREMISED UPON SEVERAL RECOGNIZED THEORIES: DMV'S DISPARATE TREATMENT, ABUSE OF GOVERNMENT POWER, INHIBITION OF CONSTITUTIONAL RIGHTS, INVIDIOUS DISCRIMINATION AND SELECTIVE ENFORCEMENT OF DMV'S PERSONNEL SYSTEM.

In Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886), the seminal equal protection case, this Court enunciated a fundamental guiding principle:

> When we consider the nature and the theory of our institutions of government ... they do not leave room for the play and action of *purely personal and arbitrary power* ... The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems intolerable in any country where freedom prevails...

Yick Wo launched more than a century of evolving equal protection jurisprudence which has become a cornerstone of individual liberty.[3]

A number of more recent equal protection cases in a variety of analogous circumstances demonstrate application of the Equal Protection Clause to Gravitte. In Maldonado v. Houstoun, 157 F.3d 179 (3rd Cir. 1998), a distinction between recent residents and older residents for benefits was held to violate the Equal Protection Clause. The distinction made no more sense than imposing ticket quotas on officers in some districts but not others.

In Backlund v. Hessen, 104 F.3d 1031 (8th Cir. 1997), the court held that nepotism in a public personnel program was irrational and arbitrary and therefore stated an equal protection claim. Nepotistic personnel practices are not unlike DMV's arbitrary ticket quotas - some officers are free from the quotas and others like officer Gravitte are stuck with the detriments. In Bannum v. City of Louisville, 958 F.2d 1354 (6th Cir. 1992), an equal protection violation was found where special zoning requirements were established for training centers for prisoners. In Stokes v. Village of Wurtsboro, 818 F.2d 4 (2nd Cir. 1987), the court held that cutting off water service because of non-compliance with a building code may constitute an equal protection violation on grounds of selective enforcement. In O'Neal v. City of

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[3]E.g., Snowden v. Hughes, 321 U.S. 1, 8-9 (1944)(an equal protection claim may be premised upon deliberate selective enforcement based upon *"unjustifiable standards."*; Oyler v. Boyles, 368 U.S. 448 (1962)(equal protection prohibits discrimination on grounds of race, religion or *"other arbitrary classification."* In Burt v. City of New York, 156 F.2d 791 (2nd Cir. 1946), Judge Learned Hand's authoritative opinion concluded that an architect stated a valid non-suspect class equal protection claim when city officials "deliberately misinterpreted and abused their statutory power in order to deny his applications." The architect alleged that city officials selected him for oppressive measures, unconditionally approving applications of other architects similarly situated. The architect alleged that he was a victim of "purposeful discrimination." Judge Hand concluded for the court that the plaintiff stated a valid non-suspect class equal protection claim.

Seattle, 66 F.3d 1064 (9th Cir. 1995), the city's refusal to provide water service to new tenant based on prior tenant's unpaid water bill violated equal protection. The court reasoned that the governmental rationale was "illogical" and therefore could not pass constitutional muster.

The foregoing cases show the breadth of application of the equal protection principle where government has applied different standards of treatment to individuals. .

V. GOVERNMENTAL CLASSIFICATIONS OR CONDUCT PREMISED UPON LOCATION HAS FREQUENTLY BEEN HELD UNCONSTITUTIONAL AS BEING WITHOUT RATIONAL BASIS.

Respondents have arbitrarily distributed employment benefits and imposed burdensome conditions with distinctions based upon work location alone. The Court has struck such location based distinctions as violating equal protection. See Williams v. Vermont, 472 U.S. 14 (1985)(Vermont use tax discriminated against certain non-residents held not to further any legitimate governmental objective"; Zobel v. Williams, 457 U.S. 55 (1982)(Alaska law providing for distribution of state benefits by length of residence held unconstitutional).

In Metropolitan Life v. Ward, 470 U.S. 869 (1985), the Court held that a state domestic preference tax imposing a substantially lower tax rate domestic on insurance companies than on out-of-state insurance companies violated the Equal Protection Clause. The Court reasoned that government may not constitutionally favor its own residents by taxing foreign corporations at a higher rate because of their residence. Location of business was held to not constitute a proper consideration. Neither does location of DMV officers.

In U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973), the Court held that a certain provision within a food stamp act which excluded from participation any household containing an individual who was unrelated to another

member of the household violated equal protection. The Court reasoned that the provision did not rationally further any legitimate state objective.

Respondents fail this second prong of rational basis analysis because its quotas do not rationally further any legitimate interest. The result of the quotas is not enhanced productivity, but "frustration, hardship, fear, worry and stress upon DMV officers..." Complaint, JA 224. The quotas have "caused the morale of DMV officers to further deteriorate." Complaint, JA 225. DMV officers and management officials have further sworn to numerous ill effects of the quotas. E.g., JA 180 (DMV's quotas have seriously jeopardize[d] the efficiency and the integrity of [DMV's] law enforcement services..."); JA 185 ("the ticket quota practice has and is currently causing significant problems for DMV officers.").

In Metropolitan, the Court reasoned that promotion of domestic businesses within the state by discriminating against foreign corporations that wish to compete is not a legitimate purpose under the Equal Protection Clause, nor is the encouragement of investment in state assets and governmental securities a legitimate purpose when furthered by discrimination. If promoting local business through such means is not a legitimate governmental interest, surely ticket quotas and discrimination amongst officers among DMV districts is even more illegitimate.

Governmental retaliation for insistence with compliance with the law is not a valid legitimate governmental interest. It is in fact a "totally illegitimate animus" like in Cruz v. Town of Cicero, 275 F.3d 579, 587 (7th Cir. 2001), where the Seventh Circuit applied the Willowbrook principle and affirmed a verdict for non-suspect class equal protection violations.

VI. *SUBSTANTIVE DUE PROCESS*: OFFICER GRAVITTE STATED TRADITIONAL SUBSTANTIVE DUE PROCESS CLAIMS BECAUSE DMV'S CONDUCT WAS ARBITRARY AND CAPRICIOUS AND SUBJECTED GRAVITTE BUT NOT OTHERS SIMILARLY SITUATED TO ONEROUS BURDENS.

"The touchstone of due process is protection of the individual against the arbitrary action of government." County of Sacremento v. Lewis, 523 U.S. 833, 845 (1998). The doctrine of substantive due process continues to serve as a bedrock safeguard to prevent individuals from being subjected to government arbitrariness or oppression in the public employment context. See The Reemergence of Substantive Due Process As A Constitutional Tort: Theory, Proof & Damages, 24 New England L. Rev. 1129 (1990); Johnson v. Branch, 364 F.2d 177, 181 (4th Cir. 1966)(en banc)(arbitrariness standard adopted in public employment cases); Marks v. City of Chesapeake, 883 F.2d 308 (4th Cir. 1989).

"Arbitrary and capricious [public employment] decisions violate substantive due process." Perritt, Employee Dismissal Law & Practice section 8.15 at 245 (4th ed. 1998). "The substantive due process entitlement requires that the government should not take action that is wholly unrelated to legitimate public interests." Id. See Harrington v. Harris, 108 F.3d 598, 606 (5th Cir. 1997)(affirming jury verdict that arbitrary pay increases violates substantive due process). DMV's quota practices endanger multiple fundamental public interests: highway safety because traffic stops put officers and citizens in harm's way, economic interests because quotas waste scarce police resources, law enforcement interests because quotas distract from legitimate operations.

"There is a species of substantive due process, apart from any specific of the Bill of Rights... this is a substantive due process right akin to the "fundamental fairness" concept of procedural due process." Wilson v. Beebe 770 F. 2d 578,

586 (6th Cir. 1985). Substantive due process "is available to protect individual rights against irrational government action." Perritt, Employee Dismissal Law and Practice, section 6.13 at 350 (2d ed. 1987).

A) THE APPLICABLE SUBSTANTIVE DUE PROCESS STANDARD IN PUBLIC EMPLOYMENT CASES IS THE ARBITRARY AND CAPRICIOUS TEST RATHER THAN THE SHOCKS THE CONSCIENCE TEST; HOWEVER EVEN THAT STANDARD IS MET BY RESPONDENT'S QUOTA PRACTICES.

The Fourth Circuit below appears to have applied a heightened shocks the conscience substantive due process test rather than the traditional arbitrary and capricious test.

The worthy substantive due process question for this Court is what standard of proof applies in a public employment dispute.

In County of Sacramento, this Court enunciated a "shocks the conscience" test for police chase cases. A public employment dispute is, however, contextually very different. The shocks the conscience test is unworkable in the employment context because it is insufficiently specific and does not define the parameters surrounding employment terms and conditions.

County of Sacramento was a law enforcement conduct case arising out of a chase by an officer in a police vehicle. In that traditional police pursuit context, this Court applied the "shocks the conscience" standard. However, Respondent overlooks the fact that several courts have carved out another substantive due process test when the underlying conduct involves governmental employment action as opposed to police pursuit conduct.

This case is certainly far closer to Johnson v. Branch and its progeny than the vastly different vehicle pursuit scenario as in Lewis. The record demonstrates how both DMV management officials and law enforcement personnel expert

James Merritt are outraged at these quota practices. E.g., JA 183, 185, 99.

The totality of the conduct in this case is sufficiently egregious that it satisfies the shocks the conscience test. When government officials engage in conduct which they have been taught is illegal and improper, JA 347, 473, consciences should be shocked - especially when they obstruct justice, mandate arbitrary law enforcement action, and overtly retaliate and discriminate.

DMV's conduct violated substantive due process because, as in Johnson v. Branch, there was no reasonable basis in fact or determining principle underlying Defendants' ticket quota scheme and consequential discipline of Gravitte. In Johnson v. Branch, 364 F.2d 177, 181 (4th Cir. 1966)(en banc), the court concluded that the governmental conduct in issue was arbitrary and capricious and therefore violative of substantive due process because the underlying reasons for the government action were trivial.

The second type of quota, the 20% quota, additionally fails because it cannot be predetermined:

> "If an officer falls 20% below the district average, the officer is subject to and is given official adverse personnel action in the form of a written supervisory complaint." JA190

However, the district average number of enforcement actions is a number which is not necessarily known. JA 188. Therefore, officers are encouraged to issue substantial numbers of tickets so that they will hopefully be within the district average and not consequently get punished. JA188; 172. This quota therefore fails to afford notice of the purported standard, which deprives Officer Gravitte of due process.

VII. THE COMPLETE ELIMINATION OF POLICE DISCRETION VIOLATES DUE PROCESS AND FURTHER ENDANGERS THE LAW ENFORCEMENT PROFESSION.

The elimination of police discretion by DMV's quotas further demonstrates DMV's violation of substantive due process - because it is irrational and arbitrary to take away Gravitte's legitimate police discretion and not take away the police discretion of other DMV officers in other districts.

In McCleskey v. Kemp, 481 U.S. 279, 297 (1972), this Court explained that law enforcement "discretion is essential to the criminal justice process." This Court and commentators have reaffirmed the need for traditional police discretion. E.g., City of Chicago v. Morales, 119 S.Ct. 1849 (1999)("Some degree of police discretion is necessary to allow the police to perform their peacekeeping responsibilities satisfactorily.")(O'Connor, J., concurring); Colorado v. Bertine, 479 U.S. 367, 375 (1987). Scholars have demonstrated the necessity of traditional police discretion. E.g. Reiss, Consequences of Compliance and Deterrence Models of Law Enforcement For The Exercise of Police Discretion, 47 Law & Contemporary Problems 83 (1984).

DMV officials acknowledged that DMV officers enjoy police discretion. JA348 DMV's ticket quotas destroy necessary officer discretion and consequently interfered with Gravitte's ability to properly perform his law enforcement functions. JA197-199. The deprivation of traditional police discretion through Respondents' quota scheme will thwart the delivery of police services.

VIII. *UNCONSTITUTIONAL CONDITIONS*: THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS PROHIBITS DMV FROM IMPOSING TICKET QUOTAS AS A CONDITION OF EMPLOYMENT.

The doctrine of unconstitutional conditions has historically prevented government officials from coercing conduct of citizens through the threat and withholding of benefits. E.g., Perry v. Sinderman, 408 U.S. 593, 597 (1972)(noting that "we have most often applied the principle [of unconstitutional conditions] to denials of public employment"). The "unconstitutional conditions line of analysis" is most prevalent in public employment litigation. See Rutan v. Republican Party, 497 U.S. 62, 77-78 (1990). In Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967), the Court explained:

> "the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected..."

"[O]ur modern unconstitutional conditions doctrine holds that the government may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech even if he has no entitlement to the benefit." Board v. Umbehr, 116 S.Ct. 2342, 2347 (1996)(internal quotations omitted).

Public employees "have the right to be free from the imposition of unconstitutional conditions in connection with that employment." Buckley v. Board, 476 F.2d 92, 97 (10th Cir. 1973). As explained in Frost v. Railroad Commission, 271 U.S. 583 (1926):

> no conditions can be imposed by the state which are repugnant to the Constitution and laws of the United States. Id. at 594.... [Government] may not impose conditions which require the relinquishment of constitutional rights.... Id.

In Lovvorn v. City of Houston, 846 F.2d 1539, 1545 (6th Cir. 1988), the court explained that the doctrine of unconstitutional conditions is "a doctrine increasingly used today to limit the conditioning of government jobs and benefits upon a waiver of constitutional rights."

CONCLUSION

Non-suspect class equal protection issues frequently arise in law enforcement and other public sector workplaces. However, from a national perspective, the law is extraordinarily unclear. Both the decision below and the Fourth Circuit's reasoning in other similar cases is both inconsistent with Willowbrook and in conflict with other circuits. This Court's instruction is critically needed.

Therefore, this Court should grant this Petition for Certiorari and reverse the court below.

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UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 01-1718

MARK GRAVITTE,
Plaintiff-Appellant,

and

NORTH CAROLINA POLICE BENEVOLENT ASSOCIATION,
Plaintiff,

v.

NORTH CAROLINA DIVISION OF MOTOR VEHICLES; NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; DAVID MCCOY; JANICE FAULKNER; DAVID RICHARDS; STATE OF NORTH CAROLINA, and all agents and successors in office of the official capacity defendants,
Defendants-Appellees,

SOUTHERN STATES POLICE BENEVOLENT ASSOCIATION,
Amicus Curiae.

Appeal from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
Terrence W. Boyle, Chief District Judge.
(CA-00-845-1-BO)

Argued: February 25, 2002
Decided: March 25, 2002
Entered: March 25, 2002

Before LUTTIG and GREGORY, Circuit Judges, and
Henry M. HERLONG, Jr., United States District Judge
for the District of South Carolina,
sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Joseph Michael McGuinness, The MCGUINNESS LAW FIRM, Elizabethtown, North Carolina, for Appellant. Jeffrey Reid Edwards, Assistant Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellees. **ON BRIEF:** Roy Cooper, North Carolina Attorney General, Hal F. Askins, Special Deputy Attorney General, David Roy Blackwell, Special Deputy Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellees. Richard Hendrix, Stem, North Carolina for Amicus Curiae.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Mark Gravitte is a law enforcement officer with the North Carolina Division of Motor Vehicles ("DMV"). He, along with the North Carolina Police Benevolent Association ("NCPBA"), claims that certain policies of his

employer, which require police officers to average a minimum number of enforcement actions and citations each day, violate his constitutional rights. The district court dismissed Gravitte's and NCPBA's section 1983 complaint for failing to state a claim on which relief may be granted, and for the following reasons, we affirm.

I.

According to the plaintiff's complaint, which we must accept as true for the purposes of a motion to dismiss, the defendants have implemented a "ticket quota" policy, "which is employed against ...law enforcement employees of DMV within some DMV districts including Plaintiff Gravitte herein." J.A. 221. In the districts that employ these "ticket quotas," DMV officers are expected to: 1) average five "enforcement actions" per day,[1] J.A. 50. 2) average two inspections per day on commercial vehicles, 3) issue "a certain number" of traffic citations, and 4) issue "enough" overweight citations on commercial vehicles. J.A. 225-26. DMV officers who fail to meet these expectations are given supervisory complaints. *Id.*

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1 This policy is evidenced by a June 8, 2000, memorandum from Gravitte's supervisor, Sgt. C. O. Edwards, which states in part:

> [T]he requirement for an average day's work is five enforcement actions per day....
>
> Stopping only 4 trucks in an eight hour or ten hour period, shows poor work habits...Unless tied up it is easy to stop a truck per hour to perform some type of check.
>
> There are way too many NCUC being written on private vehicles. The area of responsibility is Commercial vehicles not private. I am requesting that you get in your area of responsibility and give the State of North Carolina DMV Enforcement Section a good eight hours work each day.

The complaint asserts that this "ticket quota" policy interferes with police discretion, pressures DMV officers to "selectively enforce the law," and is causing "frustration, hardship, fear, worry, and stress" upon DMV officers. J.A. 224. Gravitte, in particular, alleges that this policy is adversely affecting his employment and career, and references an October 19, 2000, memorandum in which Sgt. C. O. Edwards rebuked Gravitte for issuing too many traffic tickets to private vehicles for speeding, and not enough citations to commercial vehicles. J.A. 45. The plaintiffs allege that this "ticket quota" policy violates the Equal Protection clause, the Due Process clause, the Privileges and Immunities clause, and the Fourth Amendment. They seek declaratory and injunctive relief.

II.

In determining whether the plaintiffs have stated a claim under section 1983, we must determine whether the alleged "ticket quota" policy infringes rights of the plaintiff's secured by the United States Constitution. We are convinced that it does not. With regard to the plaintiffs' Equal Protection claim, the mere assertion that the DMV district in which Gravitte worked imposed "ticket quota" policies on its officers, while other districts in North Carolina did not, is insufficient to state a violation of the Clause. The Constitution does not require state agencies to impose identical employment policies over each of its geographic subdivisions. Moreover, the priorities of local law enforcement units vary over different geographical regions; hence, officers who work in different districts of the DMV are not similarly situated for the purposes of equal protection analysis. And Gravitte was treated no differently than the other similarly situated DMV officers in the district where he worked - they were all subject to the ticket quota requirement.

The plaintiffs' due process claims are also without merit. The due process clause protects the right of an individual to pursue his chosen occupation, *see Conn v. Gabbert*, 526 U.S. 286, 291-92 (1999); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), although this right is subject to reasonable government regulation. *See Conn*, 526 U.S. at 292. But the right to occupational liberty does not provide for judicial scrutiny when the government acts as employer to regulate the employment relationship with its own employees. Rather, it protects the right to pursue one's calling in the private sector from licensure or regulatory requirements that lack a rational relationship to a legitimate governmental interest. *See e.g., Craigmiles v. Giles*, 110 F. Supp. 2d 658, 661-62 (E.D. Tenn. 2000) (invalidating a state law that required any person selling caskets to hold a funeral director's license issued by the state). No such claim is alleged here.

The substantive component of the due process clause also protects the individual against "arbitrary government action." *See County of Sacramento v. Lewis*, 523 U.S. 833 845-46 (1998). However, in cases challenging executive action, (rather than legislation), under the substantive due process clause, "*only the most egregious official conduct* can be said to be 'arbitrary in the constitutional sense.'" *Id.* at 846 (emphasis added) (citations omitted). *Compare Rochin v. California*, 342 U.S. 165, 172 (introduction of evidence at trial obtained by forced pumping of suspect's stomach was so "brutal" and "offensive to human dignity" as to violate the due process clause), *with Lewis*, 523 U.S. 833, 854 (allegation of police officer's "deliberate and reckless indifference to life" during a high-speed automobile chase that ended in the death of a motorcycle passenger did not state a claim of "arbitrary conduct" under the substantive due process clause).

The alleged facts regarding the defendants' ticket quota policy are not even close to an allegation of "egregious" or outrageous" executive action necessary to

state a substantive due process claim under *Lewis*. *See* 523 U.S. 833, 847, n.8. The policy adopted by the DMV helps to ensure a minimum quantity of work from its law enforcement officers and helps to prevent shirking on the job. An employment policy enacted in pursuit of these goals, goals that would be shared by any reasonable employer, can hardly be deemed "egregious" or "outrageous," even if it impinges on traditional police discretion and imposes more burdensome working conditions on law enforcement officers. The plaintiffs' allegation that officers are "pressured and coerced to violate the law as a result of the ongoing ticket quota scheme,"[0] J.A. 234, does not alter our conclusion. While it is conceivable that officers might be tempted to fill their quota by issuing citations for borderline or non-existent violations out of laziness, there is no allegation that the numerical quotas are so onerous that it is *impossible* for a diligent DMV officer to meet them without breaking the law. To be sure, the alleged ticket quota policy makes a law enforcement officer's job more difficult. We are also sure that is not enough, standing alone, to constitute a substantive due process violation.

Moreover, although we need not resolve this issue, it is far from clear that the defendants' actions, even if they could be deemed "arbitrary" in the constitutional sense, have deprived (or have threatened to deprive) Gravitte of any cognizable liberty interest of property interest. Although Gravitte was a tenured employee of the DMV, he was not fired from his job, but was merely criticized by his supervisor for issuing too many speeding tickets to private vehicles and not enough citations to commercial motor vehicles. J.A. 29. *See Gilbert v. Homar*, 520 U.S. 924, 929 (1997) ("[W]e have not had occasion to decide whether the protections of the Due Process Clause extend to discipline of

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[2] General Order No. 29 forbids officers from issuing citations for anything short of "*definite clear cut, substantial* violations." J.A. 64 (emphasis in original).

tenured public employees short of termination."); *Stone v. University of Maryland Medical System Corp.*, 855 F.2d 167, 172 n.5 (4th Cir. 1988) ("[A] public employer's stigmatizing remarks do not deprive an employee of a liberty interest unless they are made in the course of a discharge or significant demotion."). A plaintiff seeking to assert a substantive due process claim must allege the deprivation of a cognizable interest in life, liberty, or property; a mere allegation of "arbitrary" government conduct in the air, so to speak, will not suffice. *See Collins v. City of Harper Heights, Texas*, 503 U.S. 115, 129-30 (1992) (assuming arguendo that plaintiff had a "liberty interest" before analyzing whether the deprivation of that liberty was "arbitrary in the constitutional sense").

The plaintiffs' remaining claims merit only brief discussion. Their complaint fails to allege a violation of the Privileges and Immunities clause of Article IV because there is no allegation that the "ticket Quota" policy discriminates against citizens of states other than North Carolina. *See Toomer v. Witsell*, 334 U.S. 385, 396 (1948) (holding that the Privileges and Immunities clause "bars discrimination *against citizens of other States* where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States.") (emphasis added). And plaintiffs have no standing to assert the Fourth Amendment rights of those who "might" be illegally searched or seized solely because of the existence of the challenged policy in this case - they must allege an actual or imminent injury to their own Fourth Amendment rights, not someone else's. *See Allen v. Wright*, 468 U.S. 737, 751 (1984) ("[A] plaintiff must allege *personal injury* fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.") (emphasis added); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("[A] plaintiff must have suffered an 'injury in fact' - an invasion of a legally protected interest which is (a) concrete and particularized,

and (b) 'actual or imminent, not "conjectural" or "hypothetical."'") (internal citations omitted).

The complaint was properly dismissed by the district court.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:00-CV-845-BO(2)

NORTH CAROLINA POLICE BENEVOLENT ASSOCIATION; MARK GRAVITTE Plaintiffs	)
v. ORDER	)
NORTH CAROLINA DIVISION OF MOTOR VEHICLES; NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; DAVID MCCOY; JANICE FAULKNER; DAVID RICHARDS; STATE OF NORTH CAROLINA; AND ALL AGENTS & SUCCESSORS IN OFFICE OF THE OFFICIAL CAPACITY DEFENDANTS Defendants.	)

This matter is before the Court on plaintiffs' Motion for Preliminary Injunction, plaintiffs' Motion for Leave to File Second Amended Complaint, and defendant's Motion to Dismiss. The underlying action alleges violations of the plaintiffs' constitutional rights for an alleged "ticket quota" scheme enacted by the defendants. For the reasons discussed below, defendants' Motion to Dismiss is GRANTED and the case is DISMISSED.

BACKGROUND

Plaintiff North Carolina Police Benevolent Association ("NCPBA") is a non-profit association of law enforcement officers and related public employees. Plaintiff Gravitte is a law enforcement officer for the Division of Motor Vehicles ("DMV") of the North Carolina Department of Transportation. Plaintiffs allege that the DMV requires that its officers issue a specified number of criminal charges and citations. This "quota"[1] causes a conflict between the officers' duties to initiate a specific number of traffic stops as ordered by the DMV and their duties to stop motorists only upon a proper finding of probable cause.

On November 17, 2000, plaintiffs filed their Complaint alleging (1) imposition of unconstitutional conditions, (2) violations of substantive due process, (3) violations of their First Amendment right to free expression, (4) equal protection violations, (5) occupational liberty deprivations, and (6) violations of the Privileges and Immunities Clause of the Fourteenth Amendment. Plaintiffs also prayed for injunctive relief and a temporary restraining order. On December 14, 2000, this Court denied plaintiffs' Motion for a Temporary Restraining Order. This Court heard arguments on the preliminary injunction on January 9, 2001. On February 8, 2001, plaintiff moved for leave to file a second amended complaint. On January 19, 2001, the defendants moved to dismiss, and the plaintiffs responded on February 15, 2001. All motions before this Court have

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[1]The Pleadings refer to a "ticket quota," but the attachments to the pleadings refer to a minimum standard of "enforcement actions," which are not necessarily criminal stops.

been fully briefed and are ripe for review. First, this Court will grant plaintiffs' unopposed Motion for Leave to File Second Amended Complaint. Such leave is granted in the interest of justice pursuant to Rule 15(a) of the Federal Rules of Civil Procedure.

DISCUSSION

Defendants have moved to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. Defendants have also "raised the defense of failure to state a claim upon which relief can be granted." This Court will thus construe this motion as one under 12(b)(6) as well. Scrutiny under a Rule 12(b)(6) motion functions to test the legal sufficiency of the complaint. See Papasan v. Allain, 478 U.S. 265, 283 (1986). In acting on a motion to dismiss under Rule 12(b)(6), a court must assume all of the well-pleaded allegations in the complaint to be true. See id. When considered in this light, the complaint withstands a Rule 12(b)(6) motion if the facts, along with the essential elements of the cause of action alleged, properly state grounds upon which relief can be granted. See Conley v. Gibson, 355 U.S. 41, 45 (1957). Alternatively, a motion to dismiss under Rule 12 (b)(6) should be granted when it is clear that the plaintiff can prove no set of facts in support of the claim that would entitle him to relief. See id. Plaintiffs make many arguments as to the sufficiency of their claims. This Court will address each in turn.

1. Alleged ticket quotas are unconstitutional

Plaintiffs argue that the ticket quotas about which they complain are unconstitutional. Plaintiff first states that ticket quotas are illegal under North Carolina law. See N.C.G.S. 20-187.3. It is well-settled law that this Court lacks jurisdiction over claims brought under the auspices of state

law against the State itself by a citizen of the state. See Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).

Plaintiff next argues that this alleged ticket quota scheme violates the Fourth Amendment. Nowhere in the Second Amended Complaint do the plaintiffs allege that the officers are ordered or compelled to make vehicle stops or arrests in violation of the Fourth Amendment. Neither does plaintiffs' complaint allege the Fourth Amendment as a claim for relief.

2. *Equal protection and due process*

Plaintiffs next allege that this alleged ticket quota scheme violates the equal protection and due process rights of the plaintiffs. According to the plaintiffs, the imposition of the alleged ticket quotas in some but not all DMV districts violates these rights. These claims are untenable. Plaintiffs fail to allege or show how any due process rights or liberty interests are violated. Plaintiffs refer to a line of Supreme Court decisions and cite numerous instances where the Court recognized equal protection and due process. The plaintiffs fail to show how these cases relate to the pleadings before this Court.

In the plaintiffs' Complaint, they allege that the defendants' attempt to "selectively enforce the law is... violative of substantive due process." Nowhere else in the pleadings do the plaintiffs allege that the defendants attempt to selectively enforce the law. Taking the pleadings as true, the closest articulable due process or equal protection violation alleged in the pleadings is that the ticket quota scheme exists in only some districts. Plaintiff fails to cite any law to buttress his claim that imposing different work standards in different geographic regions is a constitutional violation. Furthermore, the State has a legitimate interest in setting minimum work standards for its law enforcement officers.

3. Unconstitutional conditions

Plaintiffs have failed to show that this alleged ticket quota imposes any unconstitutional conditions on the plaintiffs, and the conclusory allegations do not contain any factual allegations upon which to make this claim. A claim of unconstitutional conditions must be premised on the violation of another constitutional provision. As discussed elsewhere in this Order, the plaintiffs failed to show any cognizable constitutional violations, and thus their claim of unconstitutional conditions fails.

4. Privileges and Immunities violation

According to the plaintiffs, the Privileges and Immunities Clause of the Fourteenth Amendment prevents the DMV from enforcing different standards based on the residency of the officer. According to the pleadings, the different ticket quota standards apply to officers workingin different districts. Thus, these different standards of work apply based on location of work, not their residency.

5. Freedom of expression

Again, plaintiffs' pleadings fail to show any factual allegations of violations of the plaintiffs' First Amendment rights, and plaintiffs' memo failed to cite a single case to support its claim. Instead, the plaintiffs argue that the issuance of a ticket by a police officer is a communication, and thus is protected speech. The cases to which the plaintiffs cite state that police officers are afforded freedom of speech, but nowhere do these cases uphold the assertion that the issuance of criminal citations by police officers is a protected activity that is to be free of governmental control or regulation. See Wood v. Georgia, 370 U.S. 375 (1982) (out of court statements by a sheriff are protected speech and not punishable by contempt of court). To the contrary, a law enforcement officer engaged in a criminal stop, seizure, or

arrest is constrained by a multitude of constitutional and statutory provisions. To afford First Amendment protection to the issuance of a criminal citation would be in direct contravention of the Bill of Rights.

6. Standing

Plaintiffs have not alleged any facts in the case that give plaintiff North Carolina Police Benevolent Association standing. Nowhere in the Complaint do the plaintiffs allege that the NCPBA has suffered any injury in fact, that plaintiff Gravitte is a member of the NCPBA, or that any members of the NCPBA have suffered any injury in fact. Thus, the NCPBA lacks standing to bring this suit. See Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

CONCLUSION

Plaintiffs allege that a ticket quota scheme violates their constitutional rights. For the reasons state above, plaintiffs have failed to allege sufficiently any constitutional violations. Defendants motion is GRANTED and this case is DISMISSED. All other outstanding motions, including plaintiffs motion for a preliminary injunction, are DISMISSED as MOOT.

SO ORDERED

This 30th Day of April, 2001

/s/Terrence W. Boyle
TERRENCE W. BOYLE
CHIEF UNITED STATES DISTRICT JUDGE

MARK GRAVITTE,

Plaintiff-Appellant,

and

NORTH CAROLINA POLICE BENEVOLENT ASSOCIATION,

Plaintiff,

v.

NORTH CAROLINA DIVISION OF MOTOR VEHICLES; NORTH CAROLINANo. 01-1718 DEPARTMENT OF TRANSPORTATION; DAVID MCCOY; JANICE FAULKNER; DAVID RICHARDS; STATE OF NORTH CAROLINA, and all agents and successors in office of the official capacity defendants,

Defendants-Appellees,

SOUTHERN STATES POLICE BENEVOLENT ASSOCIATION,
Amicus Curiae.

April 23, 2002.

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
NO. 5:00-CV-845-BO2

MARK GRAVITTE	)
	)
Plaintiffs	)
	)
V.	)
	)
NORTH CAROLINA DIVISION OF MOTOR VEHICLES; NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; DAVID MCCOY; JANICE FAULKNER; DAVID RICHARDS; STATE OF NORTH CAROLINA; AND ALL AGENTS & SUCCESSORS IN OFFICE OF THE OFFICIAL CAPACITY DEFENDANTS	)
	)
Defendants	)

FIRST AMENDED COMPLAINT

NOW COME the Plaintiffs and allege upon information and belief the following:

JURISDICTIONAL STATEMENT

1. Jurisdiction of this court is invoked pursuant to Title 28 U.S.C. sections 1331, 1343 and 2201, and under 42 U.S.C. 1983. Jurisdiction is premised upon the existence of federal questions of law and deprivation of federally protected civil rights.

2. This is an action for a declaratory judgment, preliminary and permanent injunctive relief, and reasonable attorney fees and costs. This action arises directly under the Federal Constitution and under 42 U.S.C. 1983. This action seeks to enjoin the continuation of Defendants' policy, practice and custom of selectively imposing ticket quotas in some North Carolina DMV Districts by Plaintiff Gravitte and other law enforcement officer employees, and retaliatory adverse employment action against Plaintiff Gravitte and other law enforcement officer employees for failure to comply with Defendants' ticket quota practices.

PRELIMINARY STATEMENT AND SUMMARY

3. Defendants and their agents have developed a policy, practice, custom and scheme of imposing ticket/citation quotas on DMV employees in some DMV Districts, which obstructs justice and selectively enforces law within those Districts in violation of North Carolina and Federal law. Defendants' policy, practice and custom requires North Carolina law enforcement officers employed in some Districts by the N.C. Division of Motor Vehicles [hereinafter DMV] to issue certain numbers of citations and charges as a required function of their jobs. Plaintiff Gravitte resides within DMV District 5, which is a District that imposes DMV's ticket quota as a condition of employment.

4. Defendants have and are attempting to coerce DMV officers including Plaintiff Gravitte to stop and issue citations and criminal charges against North Carolina citizens regardless of the lack of reasonable suspicion for stopping travelling motor vehicles or a proper factual basis to initiate such charges. Defendants' ticket quota scheme constitutes an attempted obstruction of justice and selective law enforcement by forcing DMV officers, under threat of adverse personnel action and deprivation of salary, to stop

travelling motor vehicles without cause and issue charges regardless of the merits of such charges.

5. Defendants' practices are seeking to coerce Plaintiff Gravitte and other DMV officers to interfere with the right of travel of citizens to freely travel without undue governmental interference and obstruction. The practices complained of herein preclude and interfere with Plaintiff Gravitte and other DMV officers within the subject Districts from lawfully performing their jobs under the Federal and North Carolina Constitutions, under N.C.G.S. 20-114 and other law.

6. Defendants have issued adverse retaliatory disciplinary action against Plaintiff Gravitte and other DMV officers for their alleged failure to comply with Defendants' ticket quota scheme. Such disciplinary action was arbitrary, capricious, retaliatory and grounded in attempted selective law enforcement.

PARTIES

7. Plaintiff Gravitte is a citizen and resident of Rowan County, North Carolina. Plaintiff Gravitte has served for more than thirteen years as a law enforcement officer for the Division of Motor Vehicles of the N.C. Department of Transportation. Plaintiff Gravitte is currently employed as a Vehicle Enforcement Officer I. Gravitte's position requires that he enforce motor vehicle, traffic and criminal law within North Carolina. Plaintiff Gravitte possesses constitutionally protected interests in his job, career, occupation and life. Plaintiff Gravitte is a career law enforcement officer and a career state employee protected by the N.C. Personnel Act, N.C.G.S. chapter 126 and other law.

8. Plaintiff Gravitte and North Carolina DMV officers enjoy occupational liberty in their jobs and careers. Pursuant to N.C.G.S. Chapter 126, and otherwise, DMV officers who have served for more than five years enjoy

additional protection from adverse employment action. DMV officers including Plaintiff Gravitte, substantially rely upon their jobs to support themselves and their families economically. Plaintiff Gravitte and other DMV officers enjoy protected interests in carrying out their sworn law enforcement duties consistent with law without unlawful interference by Defendants or others.

9. Defendant McCoy is a natural person who resides in Wake County, North Carolina. At all times material hereto, Defendant McCoy served as the Secretary of the North Carolina Department of Transportation, a governmental agency of the State of North Carolina.

10. Defendant McCoy purportedly acted under the color of his governmental office as Secretary of the North Carolina Department of Transportation. At all times material hereto, Defendant McCoy served as an authorized official, agent, servant and employee of the North Carolina Department of Transportation and the State of North Carolina. Defendant McCoy is sued in his official capacity.

11. At all times material hereto, Defendant McCoy served as a final policymaking official of the Department of Transportation, an agency of the State of North Carolina. The acts and edicts of Defendant McCoy represent the official policy of the State of North Carolina.

12. Defendant Janice Faulkner is a natural person, and is the duly appointed Commissioner of the North Carolina Division of Motor Vehicles, which is located and headquartered in Wake County, North Carolina. This action is brought against Defendant Faulkner in her official capacity. Defendant Faulkner is a final policymaking official for the North Carolina Division of Motor Vehicles. Defendant Faulkner is an agent, servant and employee of the State of North Carolina. The acts and edicts of Defendant Faulkner represent the official policy of the State of North Carolina.

13. Defendant David Richards is a natural person, and is the duly appointed Colonel of the North

Carolina Division of Motor Vehicles. This action is brought against Defendant Richards in his official capacity. Defendant Richards is a senior final policymaking official for the North Carolina Division of Motor Vehicles. Defendant Richards is an agent, servant and employee of the State of North Carolina. The acts and edicts of Defendant Richards represent the official policy of the State of North Carolina.

14. The North Carolina Division of Motor Vehicles (NCDMV) and the North Carolina Department of Transportation (NCDOT) are duly authorized state agencies and subdivisions of the State of North Carolina. Both DOT and DMV are headquartered in Wake County, North Carolina.

15. Defendants have employed supervisory and management officials who have carried out Defendants' ticket quota scheme in some DMV Districts, whose acts and edicts represent DMV policy. The DMV ticket quota derived from officials within DMV headquarters in Raleigh.

OVERVIEW OF FACTS

16. Defendants, acting through their authorized officials, agents and employees, have developed a policy, practice, custom and scheme of requiring a ticket quota scheme which is employed against the citizens of the State of North Carolina and law enforcement employees of DMV within some DMV Districts including Plaintiff Gravitte herein. Consistent with their oaths of office and the law, Plaintiff Gravitte and DMV officers are required to initiate stops of travelling motor vehicles only upon proper findings of reasonable articulable suspicion.

17. Federal and North Carolina law require that sworn North Carolina law enforcement officers including Plaintiff Gravitte must only issue criminal and traffic charges in good faith and without regard to selective enforcement, unjustified standards or arbitrary classifications. North Carolina law enforcement officers

including Plaintiff Gravitte are forbidden by law from employing selective enforcement, arbitrary classifications or unjustifiable standards in issuing criminal and traffic charges.

18. As a part of its authorized function, DMV has a responsibility, among other things, to properly and lawfully enforce North Carolina criminal law within the State of North Carolina.

19. Rather than allowing and directing DMV officers including Plaintiff Gravitte to enforce the law consistent with their factual observations of true reasonable articulable suspicion, probable cause and actual illegal conduct, in some Districts DMV, acting through its authorized officials, agents and employees, has directed officers to issue specified numbers of criminal charges and other citations so as to comply with DMV's ticket quota scheme. These practices result in unconstitutional stops and unconstitutional seizures of citizens of North Carolina.

20. In addition to the adverse impact on North Carolina citizens from DMV's coercive pressure on law enforcement officers to satisfy and comply with the ticket quota scheme, DMV's policy, practice and custom of ticket quotas has and is adversely affecting the employment and careers of North Carolina DMV officers including Plaintiff Gravitte. Whenever there is a written supervisory complaint in the form of a counseling record which is placed within the personnel file of a DMV officer, such complaints adversely affect the ability of an officer to obtain raises and to be successful in promotional efforts.

21. DMV has developed and fostered a policy, practice and custom that considers and views the quantitative number of enforcement activities by DMV officers as a part and basis of the work performance of a DMV officer without regard to the quality of the charge.

22. When evaluating the job performance and prospects for promotions of DMV officers including Plaintiff Gravitte, DMV, acting through its officials, agents and

employees, explicitly takes into consideration the quantity of tickets issued by such officers.

23. Through a policy, practice and custom, DMV, acting through its officials, agents and employees, directly encourages and requires officers to initiate a minimum number of citations and charges on a daily basis. Whenever DMV officers prepare activity reports for submission to supervisors, and when such activity reports document a small or lesser number of enforcement actions by way of criminal charges and citations, supervisors often admonish and reprimand officers so as to encourage the issuance of more citations by DMV officers.

24. Defendants' personnel system considers and takes into account the quantitative numbers of tickets issued as a part of the DMV officers' official and permanent job and performance history. An officer's job performance and personnel history are used for purposes of disciplinary matters, promotions and other official acts which affect the occupational, employment and economic status of state DMV officers including Plaintiff.

25. In some parts of North Carolina within certain DMV Districts, DMV officials have issued actual written directives commanding the issuance of certain quantitative numbers of traffic citations. In other parts of North Carolina, DMV does not mandate the ticket quota.

26. DMV does not have uniform standards and conditions of employment for DMV officers throughout North Carolina. Employees serving within DMV Districts requiring the quotas are subjected to substantially more onerous conditions than are other employees not subjected to the ticket quotas.

27. DMV's policy, practice and custom of ticket quotas has caused DMV officers to feel pressure to selectively enforce the law so as to remain in good standing with their supervisors and DMV and be eligible for salary raises and promotions.

28. DMV's ticket quota scheme has caused and is causing frustration, hardship, fear, worry, and stress upon DMV officers who wish to comply with their oaths of office and honorably enforce the law generally but are nevertheless pressured and coerced to violate the law as a result of the ongoing ticket quota scheme maintained by DMV.

29. DMV's policy, practice and custom regarding the imposition of ticket quotas has and is adversely affecting the employment relations and lives of Plaintiff and other DMV officers within North Carolina.

30. DMV's's ticket quota scheme unlawfully and unethically interferes with and obstructs proper enforcement of the law and legitimate police discretion. Acting through some authorized supervisory management officials, DMV has advocated compliance with numerical ticket quotas through explicit quantitative demands. These ticket quota demands, both verbally and in writing, have frustrated, obstructed and interfered with the law and the code of ethics that DMV officers are required to comply with.

31. DMV officers who do not comply with DMV's ticket quota scheme are sometimes chastised, reprimanded, subjected to supervisory complaints and otherwise adversely affected because of their non-compliance with the ticket quota scheme. Such officers are penalized in pay if they do not comply with DMV's ticket quota schemes, thus causing economic harm to the officers.

32. DMV's ticket quota demands have not only not enhanced productivity, the practice has caused the morale of Plaintiff and DMV's officers to further deteriorate.

DMV's ticket quota demands have caused Plaintiff and DMV officers to experience unnecessary stress as a result of actual or implied threats made by DMV tō officers to comply with the ticket quota scheme.

33. After having knowledge that such ticket quotas exist, DMV officials have failed to take appropriate

corrective action. DMV officials have directly and indirectly condoned, ratified and acquiesced in the continuation of DMV's ticket quota scheme.

34. DMV has promulgated the attached policy entitled "Averages for DMV Enforcement" whereby a six-month average of citations is issued as being minimum for each of five categories of enforcement. DMV conditions good job performance evaluations upon the issuance of the minimum number of citations for each of the five categories. DMV computes figures showing the average number of citations and enforcement actions issued within each district. If an officer falls 20% below the district average, the officer is subject to and is given official adverse personnel action in the form of a written supervisory complaint. At the end of each quarter of each year, DMV officers within the Districts imposing quotas are given supervisory complaints if they fail to do any of the following: do not average five enforcement actions per day, failing to average two inspections per day on commercial vehicles, failing to issue a certain number of traffic citations, and/or failing to write enough overweight citations on commercial vehicles. As to the district average number of enforcement actions in a given time, officers will not necessarily know and often do not know what the precise district average is or even have any ideas to what the district average is. Therefore, officers are implicitly encouraged to issue substantial numbers of enforcement actions so that we will hopefully be within the district average and not get punished.

35. The "Averages for DMV Enforcement" is attached hereto and incorporated by reference the same as if fully set forth. Attached hereto and incorporated by reference the same as if fully set forth is Defendant's "oath of office" which is administered to DMV law enforcement officers which they are required to comply with.

36. DMV Lt. W.E. Thompson proclaimed in official memoranda, attached hereto and incorporated by reference:

> "Since Raleigh has mandated we all perform five enforcement activities per day, it is important that the daily [report] be filled in COMPLETELY." (Emphasis in original).

37. On June 8, 2000, one of Defendants' authorized agents issued the attached memoranda requiring that five enforcement actions per day be taken and that anything less than this is unsatisfactory.

38. On August 1, 2000, Defendants' authorized agents issued the attached memorandum regarding "NCUC traffic citations" where Defendants insisted that "issuing citations is #6 on your KR responsibility list."

39. On October 19, 2000, Plaintiff Gravitte was subjected to disciplinary action whereby Plaintiff Gravitte was ordered to "[i]mmediately, Ofc. Gravitte is to issue more NCUC's to CMV's than to the private sector...." This order has adversely interfered with Plaintiff's ability to lawfully carry out his sworn law enforcement duties, has deprived Plaintiff of using legitimate police discretion, and has and will adversely affect Plaintiff's employment and career history with DMV and other future prospective law enforcement employers.

40. Because of his residence and assignment in DMV District 5, Plaintiff Gravitte is being subjected to DMV's ticket quota as a condition of employment. Other DMV officers similar to Gravitte who reside in other Districts, which do not require the ticket quota as a condition of employment, are not subject to the same onerous terms and conditions of employment as Plaintiff. Other similar employees in some Districts have been subjected to adverse employment action when they have failed to comply with Defendants' ticket quota scheme.

41. There is no compelling or other legitimate governmental interest in DMV's ticket quota scheme and for imposing job conditions including the subject ticket quotas in some DMV Districts but not in other Districts.

Defendants' policies and practices promoting ticket quotas are irrational.

INJUNCTIVE RELIEF

42. Defendants' conduct in maintaining their ticket quota scheme within some Districts is an unconstitutional practice and custom which violates the rights of North Carolina citizens and Plaintiff herein under the First, Fourth, Ninth and Fourteenth Amendments to the United States Constitution.

43. Defendants' conduct has caused Plaintiff to suffer irreparable harm which will continue unless enjoined by this court. Plaintiffs have no adequate remedy at law to redress the deprivation of their rights. Plaintiffs seek temporary and permanent injunctive relief enjoining Defendants' continuation of any form of minimum numerical issuance of criminal or traffic charges and consequential personnel action or threats against Plaintiff Gravitte or other DMV officers.

44. The attached exhibits are incorporated by reference herein the same as if fully set forth.

FIRST CLAIM FOR RELIEF: IMPOSITION OF UNCONSTITUTIONAL CONDITIONS

45. Plaintiffs incorporate by reference and reallege all previous allegations. To require a law enforcement officer to issue a predetermined quantity of charges or citations under threat of adverse employment action constitutes an unconstitutional condition of public employment. Defendants' conduct in punishing Plaintiff Gravitte deprived Plaintiff of his protected interests in violation of the doctrine of unconstitutional conditions as guaranteed by the First, Ninth and Fourteenth Amendments to the United States Constitution.

SECOND CLAIM FOR RELIEF:
SUBSTANTIVE DUE PROCESS

46. Plaintiffs incorporate by reference and reallege all allegations herein. Defendants' conduct in punishing Plaintiff Gravitte constitutes arbitrary, capricious, irrational, selective and discriminatory conduct. Defendants' conduct in attempting to selectively enforce the law and obstruct justice by imposing ticket quotas in some DMV Districts is patently unconstitutional, shocking to the conscience and violative of substantive due process. Defendants' conduct constituted an arbitrary interference with Plaintiff's employment with the State of North Carolina. Defendants' conduct has interfered with Plaintiff's job and career in violation of the doctrine of substantive due process as guaranteed by the First, Ninth and Fourteenth Amendments to the United States Constitution.

THIRD CLAIM FOR RELIEF:
FIRST AMENDMENT EXPRESSIVE CONDUCT

47. Plaintiffs incorporate by reference and reallege all allegations herein. In carrying out their law enforcement duties, law enforcement officers including Plaintiff Gravitte communicate as a part of the investigative and charging process. As a part of his official duties, Plaintiff Gravitte is required to properly communicate upon matters of public concern including but not limited to the issuance of proper charges and the failure to issue charges when sufficient evidence is lacking. Defendants' conduct seeks to restrict Plaintiff's proper communications about matters of public concern. Defendants' conduct including but not limited to imposing discipline upon Plaintiff Gravitte for official law enforcement conduct is in violation of the First Amendment to the United States Constitution. These claims arise both directly under the Constitution and under 42 U.S.C. 1983.

FOURTH CLAIM FOR RELIEF: EQUAL PROTECTION

48. Plaintiffs incorporate by reference and reallege all allegations herein. Defendants further violated Plaintiffs' equal protection rights by employing a gross abuse of power, by intentionally employing a scheme of selective enforcement, through the use of unjustifiable standards, through the use of arbitrary classifications, through invidious discrimination, through arbitrary administration, through retaliation for the exercise of constitutional rights and by fundamentally unfair procedures. Defendants further violated Plaintiffs' equal protection rights by Defendants' intent to inhibit and punish Plaintiff for the exercise of constitutional rights. Defendants have singled out Plaintiff Gravitte for adverse discriminatory treatment. Defendants have therefore violated the Ninth and Fourteenth Amendments to the United States Constitution.

FIFTH CLAIM FOR RELIEF: OCCUPATIONAL LIBERTY DEPRIVATION

49. Plaintiffs incorporate by reference and reallege all allegations herein. Defendants' conduct is restricting the ability of Plaintiffs to lawfully and properly perform their jobs as law enforcement officers, therefore, Plaintiffs are being deprived of their occupational liberty protected by the Fourteenth Amendment to the United States Constitution.

SIXTH CLAIM FOR RELIEF: PRIVILEGES AND IMMUNITIES

50. Plaintiffs incorporate by reference and reallege all allegations herein. Plaintiff Gravitte and other DMV officers residing within Districts which enforce DMV's ticket quota scheme have been subjected to violations of the Privileges and Immunities Clause of the Fourteenth Amendment by Defendants' conduct and practices.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray the court for the following relief:

1. Enjoin Defendants from enforcing its quota scheme on Plaintiff Gravitte and all other DMV law enforcement officers; and

2. Enjoin Defendants from further acts of retaliation against Plaintiff Gravitte including but not limited to the adverse action taken against him for allegedly being in non-compliance with Defendants' ticket quota scheme, and to withdraw and remove the disciplinary action against Plaintiff Gravitte from his personnel files; and

3. Retain jurisdiction to assure full compliance with law; and

4. Award Plaintiff reasonable counsel fees and costs pursuant to 42 U.S.C. 1988; and

5. Grant Plaintiffs a declaratory judgment adjudging that Defendants' conduct as described herein constitutes violations of law as alleged herein; and

6. Issue a permanent injunction enjoining Defendants, their agents, employees, and all others acting in concert with any of them from:

A. Maintaining an unconstitutional or otherwise illegal system of employment based upon arbitrary, capricious, or otherwise improper factors; and

B. From committing or conspiring to commit any other illegal conduct against Plaintiff Gravitte; and

C. Imposing, directly or indirectly, any form of ticket quotas upon Plaintiff Gravitte or any other law enforcement officer.

7. For a trial by jury on all issues so triable.

8. Award such other and further relief as this court deems just and proper.

/s/_____
J. Michael McGuinness
P.O. Box 952
2034 Highway 701 North
Elizabethtown, N.C. 28337
910-862-7087 Telephone
910-862-8865 Facsimile
NCSB # 12196
Counsel For Plaintiffs

Certificate of Service

I hereby certify that I have served the foregoing upon Hal Askins, N.C. Attorney General, N. C. Department of Justice, P. O. Box 629, Raleigh, N.C. 27602, this 8th day of February, 2001.

/s/_____
J. Michael McGuinness